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SIMON GROENEWEGEN VAN DER MADE ON THE ENFORCEMENT OF *OBLIGATIONES FACIENDI*

1. Introduction

Simon van Groenewegen van der Made (1613-1652) is considered one of the main seventeenth-century authorities on Roman-Dutch law, although he never held an academic position at one of the universities in the Northern Netherlands. Groenewegen was born in Delft and studied law in Leiden. He became a lawyer in The Hague and, in 1645, secretary of Delft, the city he usually designated 'my mother country' (*mea patria*).¹ In this contribution we want to focus on Groenewegen's views on the possibility to precisely enforce obligations to do and, more specifically, on the references he makes in this respect to existing legal practice and a number of judicial decisions.

Why is the enforcement of contractual obligations to do problematic? People enter into a contract in the expectation that the other party will fulfil the obligation it takes upon itself. If, contrary to expectations, the desired performance turns out not to be forthcoming, it has to be seen what the creditor is entitled to claim, i.e. performance or damages. This question is all the more relevant if the performance involves a certain kind of acting, a *facere*, such as 'to go to Rome' or 'to dig a ditch'. As shown in the previous contributions in this volume, the enforcement of such obligations was a disputed question within the civilian tradition. Seventeenth century legal scholars were also aware of the controversial nature of the question and the divergent opinions handed down from the past, although those following the tradition of the *mos italicus* were especially close to the doctrines of Bartolus de Saxoferrato (1314-1357). In the second edition of the work *Syntagma iuris civilis* (1718) of the German jurist Georg Adam Struve (1619-1692), including the notes provided by Peter Müller (1640-1696), who, just like Struve, taught law at Jena, we read that the debtor in an obligation to do can discharge himself by compensating the creditor's damages if he is not willing to perform the act. A note to this state-

* Theodor Merkel supplied the succinct notes on which this contribution is based. Jan Hallebeek supplemented, documented and further elaborated these notes into the present text.

¹ Beinart 1988.

ment, however, explains that opinions amongst medieval scholars were divergent. The main reason for considering it possible to pay damages was that enforcing an obligation to do would require force to be applied against the debtor, and this would infringe on the Roman citizen's liberty.²

2. Developments in the civilian tradition

Firstly it is appropriate to recapitulate that we should distinguish between various kinds of performances. In the case of stipulations to give something (donations or legacies), the debtor is obligated to transfer ownership of something to the creditor. This type of performance is termed as giving (*dare*). As regards the enforcement of such obligations to give, glossators such as Johannes Bassianus (late 12th century) and Azo († 1230) developed a clear rule: the creditor has a right to specific performance and may claim the object due. The court must order its delivery and this order can *manu militari* be enforced.³ The latter was based on the provision of D. 6.1.68, which also applied to court orders to restore an object to its rightful claimant.

D. 6.1.68 *Ulpian, Commentary on the Edict, book LI*: From the one who is ordered to return (a thing) and does not obey the court order, maintaining that he is not capable of doing so, the possession shall, if indeed he holds the object, be forcibly transferred by order of the judge (...). This is the general rule applicable to all remedies, no matter whether they are possessory, or based on real or personal rights, which result in a judicial decision to hand over the object.⁴

In other obligations the debtor was obligated not to give, but to do something (*facere*), while a specific kind of such doing was the seller's obligation to provide the buyer with undisturbed possession of the merchandise. The Latin term used to indicate this specific kind of doing, consisting in transferring possession of the thing sold to the buyer, was *rem tradere*. Sometimes the *Corpus iuris* also uses the term *praestare*. There are no clear rules in the *Corpus iuris* as regards the enforceability of such an obligation to grant the buyer possession. It is stated in D. 19.1.1pr that the buyer can claim damages, but nothing is said about his being entitled to demand specific performance.

D. 19.1.1pr *Ulpian, Commentary of the Civil Law, book XXVIII*: If the object sold is not conveyed, the buyer will claim the amount of his interest in having the object (...).⁵

² Exercitatio 47 (ad D. 45.1) § 22 note θ (Struvius 1718, p. 565).

³ See the contribution of Dondorp in this volume.

⁴ D. 6.1.68 *Ulpianus libro quinquagesimo primo ad edictum* Qui restituere iussus iudici non paret contendens non posse restituere, si quidem habeat rem, manu militari officio iudicis ab eo possessio transfertur. (...) haec sententia generalis est et ad omnia, sive interdicta, sive actiones in rem sive in personam sunt, ex quibus arbitrato iudicis quid restituitur, locum habet.

⁵ D. 19.1.1pr *Ulpianus libro vicesimo octavo ad Sabinum* Si res vendita non tradatur, in id quod
→

Another fragment from the same Digest title, D. 19.1.11.2, rules that the seller should hand over the object he sold:

D. 19.1.11.2 *Ulpian, Commentary on the Edict, book XXXII*: First, the seller should deliver the object itself, i.e. hand it over. (...).⁶

Similarly, the *Corpus iuris* does not provide a clear rule for other obligations to do, i.e. not the specific obligation of the seller to transfer possession, but the obligations to perform *facta nuda*. In D. 42.1.13.1, which deals with an obligation to do resulting from a stipulation, it is stated that the debtor will be condemned to pay an amount of money. The text does not elucidate, however, whether this amount consists of damages. Such is the case when the obligation results from a *stipulatio* because stipulations give rise to obligations *scripti iuris*. In other obligations to do something, for instance those resulting from employment contracts, the debtor's condemnation to pay a sum of money may comprise the amount given in the creditor's estimatory oath, i.e. his valuation under oath of his subjective interest. Payment of such an amount was seen as a kind of specific performance and not as damages.

D. 42.1.13.1 *Celsus, Digest, book VI*: When someone has promised that he will prevent that the stipulator may suffer any damage, and he does so, he does what he promised. If he does not do what he promised, he will be condemned to pay a certain amount of money, as happens in all obligations to perform a certain act.⁷

Nevertheless, the glossator Odofredus († 1265), as followed by Bartolus, considered the text of D. 42.1.13.1 to contain an argument supporting the idea that a debtor in obligations to do could confine himself to paying damages.

In another text it is stated, however, that an arbitrator can be compelled to actually perform the duties his office entails.⁸

D. 4.8.3.3 *Ulpian, Commentary on the Edict, book XIII*: ... [The magistrate] will compel an arbitrator of any rank, to fully perform the duties he accepted. ...⁹

Most Romanists these days do not feel any need to harmonize these divergent texts. Instead they try to explain each fragment against the background of its own palin-

interest agitur, hoc est quod rem habere interest emptoris (...).

⁶ D. 19.1.11.2 *Ulpianus libro trigesimo secundo ad edictum* Et in primis ipsam rem praestare venditorem oportet, id est tradere (...).

⁷ D. 42.1.13.1 *Celsus libro sexto digestorum* Si quis promiserit prohibere se, ut aliquid damnum stipulator patiatur, et faciat ne quod ex ea re damnum ita habeatur, facit quod promisit: si minus, quia non facit quod promisit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus.

⁸ There are contemporary Romanists who even read in the text an application of the *condemnatio pecuniaria* principle of classical Roman litigation.

⁹ D. 4.8.3.3 *Ulpianus libro tertio decimo ad edictum* (...) et quidem arbitrum cuiuscumque dignitatis coget officio quod suscepit perfungi, (...).

genetical context in classical law. The medieval jurists, however, adopted the *Corpus iuris* as a consistent Code of Law, promulgated by Justinian (ca. 483-565) and which had to be suitable for application in daily practice. For this reason they searched for an acceptable way to harmonize the texts and to develop clear rules of law. As regards contractual obligations to do, the prevailing opinion since the days of Bartolus was that, as a general rule, the debtor could choose between specific performance and damages. Consequently he could discharge his obligation by offering to compensate the creditor's financial interest, even if the creditor claimed specific performance. In the case of the seller's obligation to do, i.e. his obligation to transfer possession of the merchandise, there was a deviating rule. As long as the seller still had the goods at his disposal, he was not allowed to offer damages and could be compelled to perform precisely. As stated above, the transfer of possession by the seller was considered to be a specific kind of acting (*facere*), but because of its similarity to obligations to give (*dare*) the corresponding rule was applied, *viz.* that the court order condemning the debtor to perform specifically could be executed by armed force (*manu militari*).

3. Differences in doctrine and practice in the Northern Netherlands

In early modern times, the *Corpus iuris* was accepted as an additional source of law in many parts of continental Europe. This also held good for the Province of Holland, as well as for the other provinces of the Dutch Republic. This did not mean, however, that the extent of reception of Roman law or the legal rules in force were always identical. Each province was autonomous as regards its private law, while the legal authorities of the time, too, displayed divergent views, not only when describing the law in force in the various provinces, but also when arguing about doctrinal arguments or ideas derived from Natural Law. The works of Arnold Vinnius (1588-1657), one of the most important Leiden law professors in the days of Groenewegen, were more of a theoretical nature than practice-oriented. In his Commentary on the Institutes (first published in 1642), Vinnius seems to follow in the footsteps of Hugo Grotius (1583-1645) who, in his *Inleidinge tot de Hollandsche rechtsgeleerdheid* (first published in 1631), adhered to the traditional rule of civil law. In other words, in obligations to perform a *factum nudum*, the debtor may discharge himself by offering to compensate the creditor's financial interest.¹⁰ In conformity with this teaching, Vinnius rejected the opinion that all performances to do something were of the same nature and that those which consisted in a mere doing (*facta nuda et simplicia*), such as 'to go to Rome', 'to paint a painting', 'to build an apartment building' or 'to dig a ditch', were similar to those consisting in handing over a thing or transferring a right or possession. The first category of acts cannot be enforced without applying violence and pressure. Thus, since it is generally accepted that use of force against free persons is not permissible, the debtor of such obligations cannot be compelled to perform precisely what he promised. It is true that the debtor can discharge himself by performing the act, but the creditor can

¹⁰ Hugo de Groot, *Inleidinge tot de Hollandsche rechts-geleerdheid* III.3.41 (ed. Dovring, Fischer & Meijers 1965, p. 214).

only claim damages. Moreover, such a claim can be brought only after the debtor has been granted a certain period in which to perform. But if the debtor eventually falls into default (*mora*), the obligation to do is through a kind of novation transformed into an obligation to pay damages.¹¹

In later years, and after Groenewegen had published his most important writings, Ulrik Huber (1636-1694), who taught at the University of Franeker, took a completely opposite stance to that of Grotius and Vinnius. In the first part of his *Praelectionum juris civilis tomi tres* (first published 1678) he allowed indirect coercion as a means of actually enforcing obligations to do, no matter whether the doing consisted in handing over possession of the merchandise or in a *factum nudum*. Even in the latter case, he argued, there was no civil cause (*civilis causa*) for not abiding with the given word. Moreover, the maxim *ad factum posse neminem cogi* meant only that voluntary human acts could not be enforced by external pressure. In civil law, stubborn debtors are seen as being compelled to act if legal remedies, such as taking pledges, seizing possessions, pronouncing fines, using armed force and eventually imprisonment, are applied in order to enforce consent. Nothing prohibits a person who refuses to do what he promised from being restrained by such remedies.¹²

The judicial remedies Huber is referring to were applied in most of the Dutch provinces. There were, however, significant differences between legal practice in Holland, where Vinnius taught, and that in Friesland, where Huber taught. But let us first make clear that, in one respect, there was not much difference between the provinces of the Republic. In all the United Provinces the prevailing rule, as found in Bartolus, was that the buyer was allowed to enforce specific performance, as long as the seller was still in a position to deliver the merchandise. The delivery of a movable, but also of an immovable, as will be shown below, was initially enforced by applying civil custody as an indirect coercive measure (just as in the case of the delivery of fungible goods), but eventually the object sold could be taken from the seller by court order (*officium iudicis*). This clear choice for specific performance in the case of obligations to deliver the object sold is said to deviate from the earlier case law of the Great Council of Malines, which quite often ruled that the seller could not be compelled to deliver, but could perform by offering damages.¹³

As regards the obligation to perform a *nudum factum* there were, however, considerable differences between legal practice in Holland and that in Friesland. Like Utrecht, the province of Holland applied a system of civil custody (*gijzeling*) to indirectly enforce such an act. This possibility was laid down in a number of provisions to be found in the procedural instructions of the province, such as Article 14 of the new instruction of the Appeal Court (*Hof*) of Holland (21 December 1579)¹⁴,

¹¹ Vinnius 1665, Lib. III, Tit. XXIV, pr. nu. 7 (p. 652-653).

¹² See Huber 1766, Lib. III, Tit. XVI, nu. 6 (p. 296-297): (...) Sed contumaces civiliter cogi dicuntur, quando remedia illis praetoria adhibentur in hunc finem, ut adsensus eorum exprimatur, veluti pignorum capio, missio in possessionem, mulctae dictio, manus militaris, denique carcer. Nihil vetat quominus is, qui facere non vult quod facturum se promissit, iis remediis constringitur (...). See on this fragment Nehlsen-von Stryk 1993, p. 547.

¹³ See Jacobus Voorda, *Dictata ad ius hodiernum* ad D. 19.1 (ed. Hewett 2005, p. 692). Voorda's lecture notes date from the eighteenth century, but the sources and legal writings he refers to are mostly from the seventeenth century.

Articles 31 and 32 of the ordinance on justice in the cities and territories of Holland (1 April 1580)¹⁴ and Article 275 of the instruction for the High Court (*Hoge Raad*) of Holland (31 May 1582).¹⁶ The most detailed description of how exactly the judicial remedy of civil custody had to be executed can be found in the ordinance for the cities and territories. Civil custody was used to enforce judgements to precisely perform an obligation to do (*ad factum*). Firstly the defendant was ordered to place himself in an inn. If necessary, this could be followed by imprisonment, but if the debtor persisted in his refusal to cooperate, assessment in monetary terms eventually had to take place and the sentence would be converted into a pecuniary sentence. Subsequently, the execution would be directed at the debtor's property while he himself was still imprisoned.¹⁷ In Friesland, however, sentences to actually perform an act were executed in an entirely different way, *viz.* through billeting two or three court servants at the debtor's expense. If the debtor still did not perform, the number of billeted servants could be increased. Only if it was suspected that the debtor would run away, would he be held in his home or another place or even be imprisoned. It seems that Frisian law was unfamiliar with conversion of the sentence into a monetary one.¹⁸

4. Groenewegen and his references to case law

As stated above, our focus in this contribution is on references to existing legal practice, more specifically to a number of judicial decisions in the work of Simon van Groenewegen van der Made. Groenewegen deals with the enforceability of obligations to do in the notes to his edition of the *Inleidinge tot de Hollandsche rechtsleerdheid* (first published in 1644) of Hugo Grotius and in his treatise on the Roman provisions, abrogated in the Province of Holland, the *Tractatus de legibus abrogatis* (first published in 1649). In his edition of the *Inleidinge*, Groenewegen discusses the enforcement of obligations to do in two notes. As regards the seller obligated to deliver his merchandise, he states that civil custody can be applied, referring thereby amongst other things to the customary law of Antwerp.¹⁹ When dealing with the enforcement of obligations to perform a *factum nudum*, we already noted that Grotius adhered to the traditional rule of civil law whereby the debtor may discharge himself by offering to compensate the creditor's financial interest. In his note to this fragment (*Inleidinge* III.3.41), Groenewegen remarked that in his day this did not suffice and that the debtor could be compelled by means of civil custody to perform precisely.²⁰ This seems to be an important innovation. The note continues

¹⁴ See Cau 1664, p. 770. The former instruction dated from 1531

¹⁵ See Cau 1664, p. 702-703.

¹⁶ See Cau 1664, p. 833-834.

¹⁷ A more detailed description can be found in Steyn 1939, p. 29 ff. and Dondorp 2008, p. 276-278.

¹⁸ See Voorda, *Dictata ad ius hodiernum* ad D. 42.1 (ed. Hewett 2005, p. 1276-1278) referring to Huber 1686 2.40 nu. 39-40 (p. 401); in the third (1726) and later editions it is 5.40 nu. 39-40.

¹⁹ *Inleidinge* III.15.6 note 26 (ed. Groenewegen 1657, p. 276).

²⁰ *Inleidinge* III.3.41 note 94 (ed. Groenewegen 1657, p. 239): Edog huydensdaegs en mag hy daermede niet volstaen, maer kan tot 't gene hy toegeseyt heeft prijs gedwongen werden by gyselinghe (...).

with references to the procedural instructions of the province of Holland and the customs and practices of Antwerp. Before Groenewegen subsequently mentions a number of learned scholars who considered the practice of civil custody to be in conformity with Roman Law, there is also a reference to a judicial decision, *viz.* by the Council of Brabant and the Great Council of Malines recorded in Volume I of the compilation of Paul van Christynen (Christinaeus, 1553-1631). The case deals with public appraisers who were appointed to undertake an appraisal of fruits that was needed in view of a fief. Subsequently, they refused to perform the appraisal and offered damages.

I understood that, subsequently, the Council of Brabant, and even the Great Council, followed this opinion, where it ruled that the one who can be compelled to perform an act, cannot confine himself to paying damages, since for the relief of a vacant fief the feudal lord had chosen the fruits of one year, the taxation of which was, on agreement of the parties, commissioned to public appraisers who undertook to perform this. Because, since these men did not want to perform the appraisal, it was offered to reimburse the damages of the other parties, the Council decided, that they can be forced to actually perform the appraisal, according to Dumoulin in his commentary on the Parisian Customs, tit. 1, § 33, gloss. 3. n. 8.²¹

The decision seems to refer only to the commentary of Charles Dumoulin (1500-1566) on the Parisian Customs. Dumoulin wondered what to do if appraisers refused to perform their duty or untimely passed away. Surely, a solution could be to appoint others. But could the appraisers be compelled to perform their duty specifically? Here Dumoulin drew a distinction. If the appraisers had themselves undertaken the task to perform the taxation, damages had to be claimed. Their obligation could not be enforced specifically since they were not arbitrators or other public officers. It is different, however, if public appraisers were appointed for this task since they could be compelled by the court to perform precisely.²² The recording of the decision by Christynen does not make many references to Roman law texts. In the days of Groenewegen, there seems to have been no need for jurists to interpret the conflicting texts of Roman law as regards the enforcement of obligations to do. This could have been because the procedural instructions of the time, which allowed indirect coercive measures if the court ordered performance of an act, provided sufficient support for the decision under debate.

²¹ Christinaeus 1626, I, decisio 323, nu. 8 (p. 548): Ac proinde eam secutum fuisse Senatam Brabantiae intellexi, ac etiam supremam hanc Curiam: dum censuit quem praecise cogi ad factum posse, nec sufficere dare interesse cum dominus feudalis pro relevii feudi aperti eligit fructus anni, quorum aestimatio partium consensu collata est in publicos aestimatores, qui hoc faciendum susceperant. Nam cum illi nollent aestimare, sed partium interest offerretur, censuit eosdem praecise cogi posse ad aestimandum, secundum Molinaeum ad Consuetudines Parisienses tit. 1 § 33, gloss. 3 nu. 8.

²² See *Commentarii in consuetudines Parisienses*, tit. 1 § 47 [sic], glossa 3 nu. 8, in Dumoulin 1612, p. 1094: Quid si aestimatores nominati nolint negotium suscipere vel praemorianur? (...) Secus si publici aestimatores essent ad hoc nominati, quia praecise cogi possent a iudice (...).

Groenewegen discusses the subject three times in his treatise on abrogated Roman laws, *viz.* in his commentary on D. 42.1.13, C. 4.49.4 and C. 5.1.1. The first text, which states that a promisor who does not do what he promised will be condemned to pay a certain amount of money, was discussed above. The second provision, originally a constitution from the Emperors Diocletian (ca. 236-316) and Maximian (ca. 249-310), rules that if the seller does not comply with the sale, he should be condemned to damages in the amount of the seller's interest.

C. 4.49.4 *The Serene Emperors Diocletian and Maximian to Mucian* When, as result of the impudent conduct of the vendor, delivery of the object sold does not take place in accordance with the sale contract, the magistrate shall take care that in the estimation of the sentence so much will be established as the buyer considers his interest that the sale would have been performed. *Published the 6th of September during the fourth respectively the fifth consulate of the Emperors themselves.*²³

These two texts were already adduced as arguments in the medieval debate concerning specific performance. However, the third text, originally also a constitution of the above Emperors, had not previously been introduced into the debate on specific performance. It deals with a betrothal and seems to indicate that engagements to be married cannot be precisely enforced.

C. 5.1.1 *The Serene Emperors Diocletian and Maximian and the co-regents to Bianor.* A woman who is betrothed to someone is not prohibited to terminate that relationship and marry someone else. *Given the 14th of April during the consulate of the Emperors.*²⁴

In his commentary on C. 4.49.4, Groenewegen discusses the obligation resulting from a contract of sale and not the one existing in performing a *factum nudum*. He summarizes his interpretation of the text from the Codex by stating that the seller is obliged to hand over the merchandise unless he has no capacity to hand over the object.²⁵ If the seller does not fulfil this contractual obligation, Groenewegen continues, the buyer has the choice. He can demand either damages or specific performance. If the seller, however, is no longer in the position to hand over the goods, he will be discharged from his obligation by paying damages or offering substitute goods of the same quality. According to Groenewegen this was the prevailing rule in Holland, and the one also applied by the High Court (*Hoge Raad*).

²³ C. 4.49.4 *Impp. Diocletianus et Maximianus Muciano* Si traditio rei venditae iuxta emptionis contractum procacia venditoris non fiat, quanti interesse compleri emptionem fuerit arbitratu praeses provinciae, tantum in condemnationis taxationem deducere curabit. *PP. VIII id. Sept. ipsis IIII et III AA. cons.*

²⁴ C. 5.1.1 *Impp. Diocletianus et Maximianus AA et. CC Bianori.* Alii desponsata renuntiare conditioni ac nubere alii non prohibetur. *D. XVIII k. Mai. AA. cons.*

²⁵ See Groenewegen, *Tractatus de legibus abrogatis* ad C. 4.49.4 (ed. Beinart & Hewett, III p. 212): *Huius legis sententia explicatur. 1. venditor praecise tradere tenetur. 2. nisi rei tradendae facultatem non habeat. 3. (...)*

Although Groenewegen describes the rule here, he does not substantiate it with doctrinal arguments and only provides references to a number of authoritative scholars and writings, such as the Spanish jurist Diego Covarruvias y Leyva (1512-1577) and the *Paratitla in pandectarum iuris civilis libros quinquaginta* of the Flemish jurist Matthaeus van Wesembeke (1531-1586) and references to judicial decisions such as those compiled in the collection known under the name of Cornelis van Nieustadt (Neostadius, 1549-1606).

The first decision Groenewegen refers to is one by the High Court of Holland (decision L in the Neostadius collection). This deals with a seller who alleged that he could not convey the tenement he sold because he had already delivered it to another buyer. For this reason he offered the buyer damages. Whereupon the latter once again sought recourse to the Court. The Court realized that the seller was in fact still in possession of the tenement and ordered the following:

Because it surely appeared that actually the thing had not yet been conveyed, the court ruled that the condemned defendant should be held in civil custody (which we term as *gijselinge houden*), until conveyance had taken place. After all, the one who is in the position to convey a thing, cannot discharge himself by paying damages. What, if perseverance conquers the disgust of imprisonment and he refuses to deliver? Either by court order the thing should be taken from him or he should be compelled to deliver it. Only if he then refuses, the buyer can have the value of the performance estimated by the judge and execute this price by taking pledges, while the vendor will remain in custody until the price is paid through alienation of the pledges and the sentence is carried out.²⁶

There is no further substantiation in the Neostadius collection of this judgement, either by doctrinal arguments or by references to authoritative jurists, while part of the text just produced (from “After all, the one ...”) is considered to be the editor’s explanation and not part of the sentence.²⁷ Thus, the executive measure that can be used to enforce the judgement consists in taking the debtor into civil custody or even imprisonment, and only if his detention remains without the desired effect can the property be removed from the debtor by court order (*officium iudicis*). According to this decision, direct force can only be used if indirect coercion has no effect.

This sequence of measures to be applied was generally acknowledged. It can be found in, for example, the Commentary on the Pandects by Johannes Voet (1647-1713), professor at Utrecht and later at Leiden. There is, however, one

²⁶ Neostadius 1667, p. 197: (...) Verum, cum revera res, nondum tradita, comperiretur: Senatus, condemnatum civili custodia sistendum (quod *gijselinge houden* dicimus) pronunciavit, quoad rem tradidisset. Non enim solvendo interesse liberari potuit, qui rei tradendae facultatem habuit. Quod si, taedium carceris pervicacia evincat, et tradere nolit: aut iudicis officio, res ei erit auferenda, aut ad rei traditionem compellendus. Quod si nolit, tum demum emptori, facti praestationem per iudicem aestimare licebit, preciumque pignoribus captis, exequi, venditore nihilominus carcere detento, dum precium, ex pignorum raptorum distractione confectum, resque iudicata soluta fuerit (...).

²⁷ Fischer 1934, p. 279 and Steyn 1939, p. 32.

important difference between the ways in which Groenewegen and Voet interpret decision L of the Neostadius collection. Groenewegen sees it as an endorsement that a seller can be compelled to perform specifically, whereas Voet takes a different view. Firstly, referring to Groenewegen himself and to Van Leeuwen,²⁸ Voet admits that many jurists maintain that a seller can be compelled to deliver and that, according to Grotius, the buyer may choose between enforcing delivery or claiming damages. But then he continues by saying that there would be no doubt as to this opinion if, as Neostadius contends, our judges had the competence to deprive an owner of his ownership by court order and transfer it to another. However, since magistrates prefer firstly to apply civil custody as a means of coercion, the Roman rule (*nemo praecise cogi ad factum*) is still observed. Moreover, the coercive remedies mentioned appear to be aimed at other acts, naked or not, as fulfilment of the obligation. This implies that the seller can still discharge himself by paying damages.²⁹ Thus, unlike Groenewegen, Voet is of the opinion that the existing practice of civil custody cannot be interpreted in the sense that obligations to do are enforced *in specie*.

The second decision Groenewegen refers to in his commentary on C. 4.49.4 is another one by the High Court of Holland (decision LXXXII in the Neostadius collection). It deals with a seller, called Stephan, who had sold raisins to a certain Henry from Antwerp. At the same time Stephan had bought grain from Henry. Subsequently, the raisins were shipped from Spain to Antwerp, but, due to actions of war against England, the ship had lost direction. Since the raisins were no longer within reach, Stephan decided to offer Henry other raisins of an equal quality. Henry rejected the offer because the raisins offered to him were not those he had agreed on and which would be transported by sea. While Henry claimed damages from Stephan, Stephan at the same time claimed delivery of the grain from Henry. The High Court decided that Stephan was discharged from his obligation to deliver because he had offered the buyer other raisins of the same quality.

The vendor offered him other grapes (raisins) of the same quality, which the buyer rejected to accept, because those were not the ones as stipulated, which were brought here by ship. (...) After taking the case into consideration, the Court pronounced that Stephan, by offering grapes (raisins) of the same quality, was discharged from further delivery.³⁰

Although neither of these two decisions contain references to dogmatic arguments, authoritative texts or writers to endorse the judgement, both seem to be in conformity with the teachings of Bartolus, to the effect that specific performance can

²⁸ Simon van Leeuwen, *Censura Forensis*, Part. 1, book 4, ch. 19, nu. 10. Simon van Leeuwen (1625-1682) was a leading legal practitioner.

²⁹ Voet 1757, ad D. 19.1 sect. 14 (p. 662-663), dealing with the enforcement of contracts of sale.

³⁰ Neostadius 1667, decisio LXXXII (p. 236): Venditor contra, alias eadem bonitate uvas obtulit, quas ideo emptor accipere renuit, quia navi stipulata advectae non essent. (...) Senatus, causa cognita, Stephanum uvarum ejusdem qualitatis oblatione, ab ulteriori traditione immunem censuit.

be enforced as long as the seller still has the goods at his disposal. Groenewegen similarly makes no mention of other materials to support the two decisions, but merely makes reference to his own commentary on another Digest text.

This text, D. 42.1.13.1, does not deal with the obligation of the seller, but with the performance of a *factum nudum*. It was supposed to express, as a general rule, that, in the case of obligations to do something, the creditor must content himself with damages if the debtor did not do what he promised. In his commentary on D. 42.1.13.1, Groenewegen states the following:

Today in all obligations to do something, the creditor who is in a position to act, can be compelled to act and he cannot discharge himself by paying damages. See Article 275 of the instruction of the High Court of Holland.³¹

Here Groenewegen displays exactly the same approach as in his note to *Inleidinge* III.3.41. Enforcing specific performance is the general rule for all obligations to do (*facere*) and not just for a restricted number of such obligations or for the seller's obligation to convey the merchandise (*tradere*). As this fragment shows, Groenewegen does not refer for this opinion to well-known scholars such as van Wesembeke, but to the then current procedural instructions for the higher Courts of Holland. He not only mentions Article 275 of the instruction of the High Court, but also Article 14 of the instruction of the Appeal Court of Holland of 1579. It was not possible to refer to many older authorities since the idea that specific performance could be claimed in all kinds of obligations to do was not the prevailing view in the civilian tradition. It had not yet been defended by Grotius, who stated that in Natural Law there was a duty to perform precisely also in obligations to do 'whenever performance is still possible', but at the same time Grotius accepted for civil law, just as Vinnius did, the principle that in the case of a *nudum factum* the debtor may discharge himself by offering to compensate the creditor's financial interest or by paying the contractual fine agreed upon.³² As we have seen in the previous contribution, Luis de Molina (1535-1600) was probably the first person to adopt the clause 'whenever performance is still possible', not only as a condition for applying the rule of Natural Law that obligations to do can be enforced, as Grotius later also did, but also as an exception to the principal rule of civil law that obligations to do cannot be enforced. The latter opinion was not adopted by Grotius, but we cannot exclude the possibility that this view, *viz.* that obligations to do can be enforced whenever performance is still possible, was increasingly becoming accepted in

³¹ Groenewegen, *Tractatus de legibus abrogatis* ad D. 42.1.13.1 (ed. Beinart & Hewett, II p. 270-271): Hodie in omnibus faciendi obligationibus praecise ad factum cogi potest, neque solvendo interesse liberatur promissor, qui faciendi facultatem habet. Instructio Supremae Hollandiae Curiae, articulus 275.

³² Hugo de Groot, *Inleidinge tot de Hollandsche rechts-geleerdheid* III.3.41 (ed. Dovring, Fischer & Meijers 1965, p. 214): Doch hoe wel nae 't aengebooren recht iemand die iet toegezeit heeft te doen, gehouden is zulcks te doen, ingevalle het hem doenlick is, zoo mag hy nochtans nae 't burger-recht volstaen, mids voldoende den bedingher ofte aenneemer de waerde van 't gunt hem daer aen was gelegen, ofte de straffe zoo daer eenige is bedonghen by gebreck van de daed te voldoen.

Groenewegen's days. As shown above, Groenewegen himself considered Grotius' opinion on this subject to be outdated and superseded by the procedural instructions in force in the Province of Holland.

In his commentary on D. 42.1.13.1, Groenewegen also refers again to the decision, recorded in the compilation of Christynen, that he had also brought up in his notes on Grotius' *Inleidinge* and which is discussed above. At the very end of his commentary on D. 42.1.13.1, Groenewegen refers to his own commentary on C. 5.1.1. As seen above, this constitution prescribes that a woman who is betrothed to marry someone is not prohibited from terminating that relationship and marrying someone else. Groenewegen summarized his interpretation of this text by stating that under civil law no one could be compelled to fulfil a betrothal, but that in his time the situation was different, although minors could still invoke their privilege of restitution.³³ In view of the possibility of terminating a marriage in Roman law, betrothals could not be seen as binding. If a marriage has no binding force, it would be absurd – Groenewegen uses here the Latin words *absurdum* and *periniquum* – if a betrothal were to have binding force. But things had changed, Groenewegen continued. Matrimony had come to be regarded as an almost indissoluble bond. As a consequence, a betrothal attained binding force comparable to contracts of good faith (*bona fides*) and no one, except a minor, was allowed to break off such a contract unilaterally. As in all other contracts, minors could invoke the special remedy of *restitutio in integrum*.

Therefore, without the consent of the other party, no one is allowed to withdraw from a betrothal, but is obliged to implement the betrothal and thus marry the woman against his will and, when condemned, he is even constrained by imprisonment, and this is the law we follow.³⁴

Having said this, Groenewegen again refers to legal practice, this time to a fragment from the *Hollandsche consultatien* and to the above compilation by Christynen. The *Hollandsche consultatien* (Dutch consultations) was a collection of legal opinions on controversial issues by scholars and legal practitioners. The consultation in question is one by R. van Amstelredam. It does not, however, deal with an actual betrothal (*sponsalia de futura*), but with *sponsalia de praesenti*, which is in fact a marriage. Nevertheless it applies by analogy to a *consilium* (n. 1787) of Nicolaas Everaerts († 1532) dealing with a betrothal, which was phrased as 'ick sal anders genen man trouwen dan u' and which promise, according to Everaerts, was enforceable.³⁵ The fragment in Christynen concerns a scholarly debate on the enforceability of betrothals. Referring to the work *De matrimonio* by the Spanish Jesuit Thomas

³³ See Groenewegen, *Tractatus de legibus abrogatis*, ad C. 5.1.1.1 (ed. Beinart & Hewett, III p. 233): Jure civili sponsalia adimplere nemo cogitur. 1. hodie secus 2. salvo minoribus restitutionis beneficio. 3.

³⁴ See Groenewegen, *Tractatus de legibus abrogatis*, ad C. 5.1.1.1 (ed. Beinart & Hewett, III p. 233): (...) Ideoque invita parte à sponsalibus recedere nemini licet, sed contractum sponsalitium adimplere, adeoque et uxorem ducere tenetur invitatus, et vel ipso carcere cogitur condemnatus et hoc jure utimur (...).

³⁵ See Consultatien 1648, consultation 147 (p. 238).

Sanchez (1550-1610), it discusses the antinomy between X 4.1.2 on the one hand and X 4.1.10 and X 4.1.17 on the other and defends a compromise. The unwilling fiancé should first be admonished and subsequently compelled to observe his promise by court order (*per censuram*), unless there was a reasonable ground (*rationabilis causa*) not to do so, such as if the matrimony between unwilling parties was expected to result in serious sins and scandals (*gravia mala et scandala*).³⁶ In the Northern Netherlands civil custody was used to enforce the promise to marry someone and, as we know from other sources, if this had no effect, a judicial decree could solemnly pronounce the marriage to be correctly performed or the court could have its clerk (*apparitor*) represent the unwilling fiancé and perform the marriage anyway.³⁷

5. Conclusions

In the days of Groenewegen, betrothals apparently could be enforced in court. It was not obvious, however, for this kind of enforceability to be linked to the question of specific performance. After all, duties of family law are of an entirely different nature from obligations to do in patrimonial law. We are dealing here with two distinct fields of private law, each with its own rules and principles. If Simon van Groenewegen van der Made had not introduced the constitution of C. 5.1.1 into the debate on specific performance, the possible enforcement of betrothals may never have played a role in the law of obligations. Since the emergence of legal scholarship in the twelfth century jurists of the civilian tradition had struggled with the question of specific performance of obligations to do. Until Groenewegen, however, no one ventured to refer to C. 5.1.1 or to D. 24.2.2.2, which gives the correct formula for terminating a betrothal. In the monograph of Tilmann Repgen,³⁸ which thoroughly investigates the civilian doctrines on specific performance dating from the Middle Ages, one will search in vain for a single reference to this constitution. The text of C. 5.1.1 also eluded the attention of scholars such as Grotius, Vinnius, Voet, Huber and many writers belonging to the German *usus modernus*. Nevertheless, it played a distinct dogmatic role in supporting Groenewegen's teachings. According to Roman law a betrothal could be broken off since, once married, it was possible to dissolve the matrimony. The latter implied a legal argument that substantiated and confirmed the idea that a betrothal could not be enforced. In the days of Groenewegen, however, annulment of marriages was no longer permitted. The legal argument supporting the permissibility of unilaterally breaking off betrothals consequently fell away. As the next contribution shows, this all changed in the nineteenth century. A rising awareness of human rights and a growing emphasis on the personal integrity of the individual were no longer considered compatible with the idea of enforcing betrothals. The French *Code civil* (1804) no longer ruled that a betrothal resulted in an actionable obligation. In the German territories where the *ius commune* was still in force, the courts soon allowed damages as the primary remedy against unwilling fiancé(e)s or refused to grant

³⁶ Christinaeus 1626, Vol. III, decision 124, nu. 44-45 (p. 567).

³⁷ See Voorda, *Dictata ad ius hodiernum* ad D. 23.1 (ed. Hewett 2005, p. 850-852).

³⁸ Repgen 1994.

executionary measures, thereby appealing to Roman law [!], while from the middle of the nineteenth century new legislation expressly ensured that betrothals no longer resulted in actionable obligations. In Groenewegen's days, however, the enforcement of betrothals was still very much present, and applying the underlying principle to all obligations to perform an act implied that debtors could be forced to perform specifically whenever there was no legal ground to justify their breaking their promise. Enforcement of obligations to do was based on the view that the debtor committed himself to perform a certain act and, by lack of contractual or statutory possibilities to rescind the contract, could not discharge himself from that obligation by offering damages.

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